

Garay (Migration) [2018] AATA 2429 (30 May 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Rhea Garrote Garay
CASE NUMBER:	1702168
DIBP REFERENCE(S):	BCC2016/3634144
MEMBER:	Adrienne Millbank
DATE:	30 May 2018
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211 of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations. • • Statement made on 30 May 2018 at 3:04pm •

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether a genuine spousal relationship exists – Joint finances – Joint household responsibilities – Relationship held out to others – Relationship viewed as continuous and ongoing – Where the applicant provides the sponsor with a significant degree of support – Application not made within 28 days of last substantive visa expiring - Whether compelling reasons exist to waive the Schedule 3 Criteria – Considerable financial and emotional hardship if parties are separated – Decision remitted with direction

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211, 820.221, Schedule 3, Criterion 3001

CASES

Babicci v MIMA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 23 January 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 31 October 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The Delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) and cl.820.211(2)(d)(ii). Insufficient evidence was provided at the time of application to satisfy the Delegate that the applicant was the spouse or de facto partner of the sponsor. Further, the Delegate was not satisfied that there were compelling reasons to waive the Schedule 3 criteria.
4. The applicant appeared before the Tribunal on 11 May 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Tagalog and English languages.
5. The applicant was represented in relation to the review by her registered migration agent.
6. Further evidence was provided on 17 May 2018, following the hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The applicant was born in the Philippines in 1989. She has one son, born in 2005, from a previous relationship, who is not included in the application. She indicated at hearing that it is her intention to apply for her son to join her in the future.
9. The sponsor was born in 1975 in Australia and is an Australian citizen by birth. He has two adult children, 24 and 22 years old at the time of decision, from a previous relationship.
10. The parties claim they first met on 13 March 2012, in the Philippines, when the sponsor was on holidays and visiting his father, who lived there. They stayed in touch through messages, phone and video calls through Skype. The sponsor returned to the Philippines in July 2012, and the parties spent five months together. During this trip the sponsor visited the applicant's home town for two weeks and met the applicant's family, and they spent three months in Cebu.
11. The applicant first arrived on a Visitor (subclass 600) visa on 4 June 2013. She subsequently applied for and was granted five more Visitor (subclass 600) visas. She has remained in Australia since arriving on her fourth Visitor (subclass 600) visa on 1 September 2015. Since first arriving on 4 June 2013, she has departed twice, on 1 September 2013, and 14 March 2015.

12. The issues in the present case are whether the parties were in a genuine relationship at the time of application and this decision; and whether there is a compelling reason or reasons to justify a waiver of the Schedule 3 criteria.
13. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen by birth.
14. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. A copy of the parties' Queensland Marriage Certificate was provided, certifying that they married on 3 January 2016, at Tarragindi. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

Financial aspects of the relationship

16. Statements of transactions from the parties' joint bank account, for the twelve month period from 2 May 2017 to 10 May 2018, were provided. They show that the sponsor's earnings, from his work in the construction industry as a concreter, and from December 2017, his Newstart allowance, were paid into this account. They also show that it was used for household purposes, including payment of rent, groceries and utilities.
17. At hearing the parties confirmed that neither of them has other bank accounts, and that all their financial activity is managed through the joint account. The applicant confirmed that she has not worked in Australia while on her Visitor and Bridging visas, and that she does not have work rights on her Bridging E visa. She advised that when she was in the Philippines, before coming to Australia, she worked in a small family-owned business but earned little, and has no savings or funds in that country.
18. Evidence was provided in the form of Western Union receipts, that the parties have transferred funds in the order of \$100 to \$300 a month, for the support of the applicant's son, who is being cared for by the applicant's mother.
19. The sponsor described how the parties have struggled financially because he has been unable to work, since December 2017, due to a back injury. They confirmed that they own no significant assets, apart from some furniture, together, and that they have no joint liabilities. The sponsor stated that their intention, once they are both able to work, is to purchase a

house together. Each of the parties displayed familiarity with their financial situation, the nature of transactions in the joint account, and each other's future goals and intentions.

20. The Tribunal finds the parties' lack of joint assets or liabilities to be understandable, in their circumstances. The Tribunal finds that the parties have pooled their resources and that they share day-to-day expenses commensurate with being in a genuine spousal relationship.

Nature of the household

21. Evidence was provided in the form of agency letters and mail addressed to both parties, that the parties have lived at the same addresses, in a townhouse rented in joint names, and subsequently in a house owned by the sponsor's mother. The sponsor at hearing stated that since he has been unable to work, the parties have been living rent-free, while house-sitting his mother's house, which is on the market.
22. The applicant stated that she has done most of the housework, including the shopping and cooking, while the sponsor has been at work, or, since December 2017, at home but with limited mobility and suffering back pain. The sponsor confirmed that no-one else has shared their household; his adult children visit but do not stay.
23. The Tribunal finds, on the evidence provided, that the parties have established and managed a household as a de facto and spousal couple. The Tribunal finds that the sponsor has shared the care and responsibility for the applicant's 12-year old son in the Philippines, through the transfer of funds each month for his support, and through phone and video calls.

Social aspects of the relationship

24. Photos of the parties at their wedding; with members of the sponsor's family at other family gatherings; and with friends, were provided. Statutory declarations were provided by the sponsor's mother and sister, and written statements were provided by his son and daughter, all confirming that they are in regular contact with the parties, and that they know them and relate to them as a couple.
25. Copies of the applicant's Facebook pages show that her family know and recognise the parties as a couple. At hearing the applicant described how they spent several weeks, as a couple, early in their relationship, at the family home. As noted, the parties send funds monthly to the applicant's mother, for her support and for the support of the applicant's son.
26. The Tribunal finds that the parties have represented themselves to their families and to other people as a married couple; that they have been seen and related to by others as a married couple, and that they organise social activities as a married couple.

Nature of persons' commitment to each other

27. At hearing the parties stated that they have been in a relationship for nearly six years; they stated that they started dating soon after their first meeting in March 2012. As noted, evidence was provided that they have been living together in Australia since September 2015, and that they married before members of the sponsor's family, and friends, on 3 January 2016. At hearing the sponsor stated that he took marriage seriously, and waited until the parties were married, and legally committed to each other, before lodging the Partner visa application. Evidence was provided that the sponsor has identified himself as partnered with Centrelink, and that the applicant is listed as a beneficiary, along with his children, in his superannuation account.

28. At hearing the parties explained that they were confused at the time that the applicant applied for and was granted Bridging E visas. The sponsor stated that he was at the time saving the money required to lodge the Partner visa application, and that they would have lodged the claim sooner if they had understood the implications of the applicant not being a substantive visa holder at the time of application, and of the Bridging E visas she was granted not bestowing work rights.
29. A medical certificate, dated 16 May 2018, was provided by the sponsor's General Practitioner, certifying that the sponsor suffered an injury in a fall in 1992 that required spinal fusion surgery to save him from paraplegia; and that he spent the next twenty years working as a concreter where his back sustained further degenerative injury. The GP wrote:
- He has had a significant nearly seven-year relationship with (the applicant), his wife for the last two years. She acts as his carer. She is invaluable to his health as she assists with his activities with daily living. She helps him groom, shower, dress and puts his shoes on. She helps him get out of chairs and mobilize daily. She lifts anything necessary. She bends to pick up anything necessary for his care. He would not be able to function without her.
- (The sponsor) has plans to study to enable a career transition from labouring work whilst (the applicant) intends to work to support them.
30. At hearing the sponsor described how he has relied on the applicant for emotional as well as practical support, particularly over the last five months, since he has been unable to continue working, as a concreter, because of his back injury, and the parties have struggled financially. He described plans, for when the applicant has work rights, to study for qualifications in the building and construction field where he has worked for 20 years, to qualify him for office-based, project-management type work. The applicant described plans to improve her English and study for qualifications in Aged Care.

Findings

31. Information and evidence was provided to the Tribunal that was not available at the time of application. The parties presented as a credible couple at hearing; the Tribunal found the sponsor open, forthright and compelling; and the Tribunal accepted the parties' testimony regarding the circumstances of their relationship. The Tribunal finds, from the relationship statements and other evidence provided, that the parties have been in a relationship since June 2013; in a live-in relationship since September 2015; and in a spousal relationship since January 2016. The Tribunal finds that the parties have provided each other with companionship and emotional support commensurate with being a spousal couple, and that they see the relationship as long-term.
32. The Tribunal therefore finds, having considered r.1.15A(3) matters, that the parties have a mutual commitment to a shared life to the exclusion of others; and that they are in a genuine and continuing relationship.
33. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
34. Therefore the applicant meets cl.820.211(2)(a).
35. The parties are both over 18 years of age, and the sponsor is the spouse of the applicant. Therefore cl.820.211(2)(c) is met.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

36. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
37. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

38. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
39. The applicant's last substantive visa ceased on 1 September 2016. The Partner visa application was not lodged until 31 October 2016.
40. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

41. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
42. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babici v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
43. The sponsor's General Practitioner, in a medical certificate signed on 16 May 2018, advised that the sponsor suffers from a degenerative spinal condition which is most likely permanent. At hearing the sponsor described how his savings have been eroded since he has been on Centrelink benefits; how the parties had to give up their rented accommodation and move into the sponsor's mother's house; and how the applicant is his wife and not his carer, and he relies on her for companionship and emotional as well as practical support.
44. The applicant acknowledged that she could stay with her mother and siblings, and spend time with her son, if she went back to the Philippines to lodge her Partner visa application, but expressed distress at the prospect of a lengthy separation from the sponsor, at a time when he needs her support and assistance. The sponsor acknowledged that while he would need to be in Australia for medical treatment and work-related matters, he could visit the applicant if she were to return to the Philippines to lodge a Partner visa application. He stated that he would, if he had to, sell his work vehicle and tools, in order to pay the airfares. He expressed some distress at the prospect of finding the funds to lodge another Partner visa application, and at the time this would take.

45. The Tribunal accepts that the parties are in a genuine, long-term relationship and that they are suffering considerable financial stress because of the sponsor's unemployment caused by his back injury, and the applicant's lack of work rights. The Tribunal accepts that their financial stress would be compounded through the requirement for the applicant to go offshore and lodge another Partner visa application. The Tribunal further accepts that they would suffer significant emotional hardship through separation at a time the sponsor needs the support of his spouse.

Findings

46. Having considered the evidence and arguments, and the circumstances of the parties, the Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Therefore, the applicant meets cl.820.211(2)(d)(ii). Accordingly, the applicant meets cl.820.211.
47. As the Tribunal is satisfied that the parties continue to be in a spousal relationship at the time of this decision it finds that the applicant meets cl.820.221.
48. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

49. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations.

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.